IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. ————

ANTHONY TERAMINE,
Petitioner,

v.

C. J. SHUTTLEWORTH, *Warden,*
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS BELOW

Opinions below have been described in the petition for writ of certiorari under caption "Opinions Below."

II.

JURISDICTION

The statement as to jurisdiction has heretofore been set forth in the petition for writ of certiorari.

III.

STATEMENT OF THE CASE

The facts have been adequately stated in the petition for writ of certiorari under the caption "Summary Statement."

IV.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in affirming the decision of the District Court.

2. The Circuit Court of Appeals erred in not ruling that petitioner had entered upon service of second sentence imposed on petitioner on May 25th as of that date.

3. The Circuit Court of Appeals erred in not holding that *direction by District Court* as to time when service of imprisonment should begin, set forth in second sentence imposed on petitioner on May 25, 1942, when petitioner was then on unrevoked conditional parole, was invalid, in that judge had no power to tell Board of Paroles how it must act in light of second sentence.

V.

SUMMARY OF ARGUMENT

A. When a person is on parole and before revocation thereof by Parole Board is sentenced and committed for second offense, his parole is violated and service of his original sentence is interrupted and suspended. Thereafter imprisonment is attributable to second sentence, and service of unexpired term of original sentence cannot begin to run before the date that such person is returned to prison under Parole Board warrant.

B. Sentence of imprisonment of a convicted person commences to run from the date on which such person is committed to jail awaiting transportation to institution designated for service of sentence imposed.

C. Where prisoner is on unrevoked parole, directions contained in second sentence, which require action of revocation of parole board before such second sentence should begin, are invalid and beyond the power of the sentencing judge, because such direction invades the discretion and authority exclusively reserved to Board of Paroles.

D. When a sentence is subject to several constructions, one or more of which may be invalid, that construction which makes such sentence valid is accepted.

ARGUMENT

A

When a person is on parole and before revocation thereof by parole board is sentenced and committed for second offense, his parole is violated and service of his original sentence is interrupted and suspended. Thereafter imprisonment is attributable to second sentence, and service of unexpired term of original sentence cannot begin to run before the date that such person is returned to prison under parole board warrant.

The main question in this case is the time when petitioner entered upon service of second sentence imposed on May 25, 1942. If as contended by respondent, petitioner entered upon service of that sentence on November 10, 1944, *after* he had completed service of his original sentence, then the decision of the District Court and Circuit Court of Appeals is correct; if as contended by petitioner, he entered upon service of that sentence on May 25, 1942, *before* execution of Parole Board warrant and *before* revocation of parole, then the lower courts erred and petitioner's Writ of Habeas Corpus should be granted.

The Circuit Court of Appeals in its opinion held that petitioner's second sentence, imposed while petitioner was on parole, was to commence *after* completion of unexpired term of original sentence, and in this departed from the weight of authority.

This Court and other circuits have had occasion to discuss the rules of law and statutes here applicable.

In *Zerbst v. Kidwell,* 304 U.S. 359 (1938) the facts appearing are; that Kidwell had been paroled before completion of original sentence. Before expiration of original sentence, and while on parole, he committed second Federal offense for which he was convicted and sentenced and thereafter completely served such second sentence. After completion of his second sentence he was held in custody by the Warden of the penitentiary, under warrant of a parole board member alleging violation of parole.

The District Court believing the original sentence "began to run again the moment he was received at the penitentiary" discharged respondent from custody on habeas corpus proceedings, and the Circuit Court of Appeals (5th) affirmed. Certiorari was granted and the same brought to this Court. Zerbst, the petitioner, contended that when respondent violated his parole by committing second crime, he was no longer in custody under original sentence, that service of original sentence was interrupted and suspended and not resumed until completion of second sentence.

This Court upheld the latter contention and at page 361 said, in part, as follows:

> "When respondent committed a Federal crime while on parole, for which he was arrested, convicted, sentenced and imprisoned, not only was his parole violated, but service of his original sentence was interrupted and suspended. Thereafter, his imprisonment was attributable to his second sentence only, and his rights and status as to his first sentence were 'analogous to those of an escaped convict.'" (Citing *Anderson v. Corall,* 263 U.S. 193, 196, 197).

The question here raised is also found in *Hammerer v. Huff* (C.C.A. D.C.) 110 Fed. (2nd) 113. The facts therein

appearing were similar to those in *Zerbst v. Kidwell,* supra, except that here the sentencing judge had included directions in second sentence that it and unexpired portion of original sentence should run concurrently.

The Court followed the ruling laid down in *Zerbst v. Kidwell,* supra, and quoted from that decision at length, and at page 116 (3-5) said:

> "We think this decision of the Supreme Court, in view especially of the italicized portions of the opinion, makes clear that in the instant case only the District Board of Parole, by terminating the conditional release, could cause the unexpired portion of the first sentence to commence to run again, and that the trial judge in imposing the second sentence had no power to cause it and the unexpired portion of the first sentence to run concurrently.
>
> "The appellant makes the further contention that under the Act of July 15, 1932, c. 492, Sec. 6, 47 Stat. 698, D.C.Code (Supp. 1939) tit. 6, Sec. 456, supra, it was the duty of the Board of Parole at the next meeting after the issuance of the warrant and the return of the appellant to the penitentiary to give him an opportunity to appear before the Board, and that had it done so the Board itself might have terminated the conditional release and thus caused the unexpired portion of the first sentence to run concurrently with the second. We do not rule upon the question whether under the section referred to it was the duty of the Board to cause the appellant to be brought before it at the next meeting after his return to the penitentiary under the second sentence, rather then upon the parole warrant. The question on this record is not what the Board might have done. The question is whether what the trial judge did could have the effect to cause a concurrent running of the two sentences. This we have sufficiently answered in the negative."

The earliest time when the unexpired term of imprisonment of original sentence could begin to run under Parole Board warrant for violation of terms of parole is statutory, and reads as follows:

> "VIOLATION OF PAROLE; WARRANT FOR RETAKING PRISONER; EFFECT OF VIOLATION ON UNEXPIRED TERM OF IMPRISONMENT.—The said board or any member thereof, shall hereafter have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. *The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution,* and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve." *T. 18, U. S. C., Sec. 723(c).*

Prior to May 26, 1942 Petitioner was in the Wayne County Jail at Detroit, Michigan under parole board warrant for retaking "awaiting further disposition" (R. 18), and it was not until May 26, 1942 that the warrant was executed by delivering him to the Federal correctional institution at Milan.

The second sentence imposed on petitioner, contained the following direction:

> "It is further ordered by the Court that the sentence imposed upon defendant in this case shall run consecutively to sentence that defendant is now serving in case No. 21737" (R. 4).

Under the facts in the case at bar, the decisions and statutes applicable thereto, it is obvious that petitioner, on May 25, 1942, being on parole as of then, unrevoked by the Board of Parole, was not serving sentence in case No. 21737, the same being interrupted and suspended,

and that further disposition by the Board was required before original sentence could begin to run.

It, therefore, follows that the petitioner, on May 25, 1942, was imprisoned on second sentence only, and commenced serving the same on that date when he was received at the local Jail awaiting transfer to designated institution (R. 5).

Petitioner contends that the Circuit Court of Appeals erred in holding that second sentence began to run after completion of original sentence, and that therefore this Court should grant certiorari.

B

Sentence of imprisonment of a convicted person commences to run from the date on which such person is committed to jail awaiting transportation to institution designated for service of sentence imposed.

At this point we wish to call this Court's attention to the fact, that the time when sentence begins to run under sentence of imprisonment of a person convicted of a crime in a Federal Court, differs radically from the time when re-imprisonment begins to run under parole board proceedings for violation of parole.

The unexpired term of a prisoner retaken under Parole Board warrant cannot begin to run until he (prisoner) is returned to the institution designated in such warrant.

T. 18—U. S. Code, 723(c) Supra.

The time when sentence of imprisonment begins to run in case of person convicted of crime and sentenced by Federal Court is statutory, and reads as follows:

> "TIME WHEN SENTENCE BEGINS TO RUN.—The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the pentientiary, or jail for service of said sentence: *Provided, That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention.* No sentence shall prescribe any other method of computing the term."
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> *T. 18—U. S. C. par. 709 (a).*

It is the contention of the Petitioner that when he was placed in the Wayne County Jail on May 25, 1942 he thereby commenced serving his second sentence as effectively as if he had actually been taken to and imprisoned in the Federal institution designated. *Such being the case, he was entitled to have the same credited as one day upon service of such second sentence.*

> "Where Marshal takes a party under sentence into custody and takes him to a local jail pursuant to sentence, such party is in custody to await transportation to the place in which his sentence is to be served."
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> *Moss v. U. S.* 72, Fed. (2nd), 30.

The parole board warrant for retaking was not fully executed, nor was Petitioner received at a Federal correctional institution, until the following day, May 26, 1942, and under the statute applicable he was not imprisoned

thereunder. The preliminary return of such parole warrant of retaking shows that prior to such date and during the time he was at the Wayne County Jail he was "awaiting further disposition" (R. 18).

It, therefore, follows that Petitioner not having been imprisoned under a fully executed parole board warrant for retaking in accordance with the provisions of the statute governing the same *(T. 18—U. S. Code, par. 723 (c)* Supra), and Petitioner, for all intents and purposes having been placed in the Federal correctional institution designated in accordance with his second sentence of May 25, 1942, that Petitioner was on the last mentioned date imprisoned therein *and sentence thereunder had begun to run.*

Petitioner contends that the Circuit Court of Appeals erred in not so holding and that therefore this court should grant certiorari.

C

Where prisoner is on unrevoked parole, directions contained in second sentence, which require action of revocation of parole board before such second sentence should begin, are invalid and beyond the power of the sentencing judge, because such direction invades the discretion and authority exclusively reserved to board of paroles.

This has been ruled upon and decided in the affirmative in the Circuit Court of Appeals for the District of Columbia, *Hammerer v. Huff*, supra; *Tippitt v. Wood*, 140 Fed.

(2nd), 689, and in the Circuit Court of Appeals for the Tenth Circuit, *Tippitt v. Squier,* 145 Fed. (2nd) 211.

In the case of *Tippitt v. Wood,* supra, facts are similar to those in *Zerbst v. Kidwell,* supra and *Hammerer v. Huff,* supra. There was, however, included in the sentence the following provision: "* * * Sentence to run concurrently with any revocation of present * * * conditional release from U. S. Penitentiary at Leavenworth, Kansas * * *." The court in its majority opinion, at page 692, has this to say:

> "Tippitt is very clearly serving a sentence which Judge Allred did not intend that Tippitt should serve. The tragic fact for Tippitt seems to be that Judge Allred sought to encompass his judicial intention by means that were beyond his power and methods that exceeded his authority. Had Judge Allred, wishing to imprison Tippitt for a maximum of four years in any event, substracted the unserved portion of Tippitt's first sentence from four years, and imposed an absolute and unconditional sentence for a period of time represented by the difference between the two figures (four years minus 734 days), there could be no question, we think, as to the validity of the sentence.
>
> "But that is not what Judge Allred did. He first imposed upon Tippitt a sentence of four years. So far, so good. Then Judge Allred undertook (by prescribing a concurrent running of both sentences) to tell the Board what the Board must do under the circumstances. This direction lacked legal validity; for Judge Allred had no power to tell the Board how it must act in the light of Judge Allred's sentence. It is equally true that the Board could have issued no instructions to Judge Allred as to how he (in pronouncing the second sentence) must act in the light of the Board's previous action. The two jurisdictions are separate and distinct, each from the other. Unto the Board must be rendered the things that are

> the Board's; to the Judge, the things that are the judge's. Technically speaking, it was a legal impossibility for Judge Allred to make the second sentence run concurrently with the first sentence; for this first sentence was not then running but had been suspended. He could not himself awaken the sleeping sentence; by the same token, he could not forbid the Board to arouse this first sentence from the Board-imposed coma. Only the power that erects here has the power to remove."

The case of *Tippitt v. Squier*, supra, at page 213, confirms dicta in *Tippitt v. Wood*, supra, to effect that directions to the Board of Parole contained in a second sentence are invalid and beyond the power of the Court.

Petitioner contends that the Circuit Court of Appeals erred in not holding that that portion of petitioner's second sentence, which would require the Board of Parole to act on revocation of Parole before second sentence could begin to run, was invalid and beyond the power of the District Judge. Therefore, Petitioner further contends that this Court should grant certiorari.

D

When a sentence is subject to several constructions, one or more of which may be invalid, that construction which makes such sentence valid is accepted.

Examination of second sentence imposed on petitioner discloses, *if the last paragraph thereof be eliminated*, a sentence complete and in proper form. (R. 4). *T. 18, U. S. C. A. 709 (a)* supra.

It has been consistently held that the sentencing Judge cannot invade the exclusive authority vested in the parole board so as to cause second sentence and original sentence to run concurrently. *Zerbst v. Kidwell*, supra; *Hammerer v. Huff*, supra; *Tippitt v. Wood*, supra; *Tippitt v. Squier*, supra. *Title 18, U. S. Code, Sec. 719.* The cases herein cited applying the rule that it is beyond the power of such judge to cause the Board of Parole to act with respect to original sentence, until such time as the Board in its discretion sees fit to act.

The decisions herein cited have laid down a consistent and correct practice with respect to second sentences imposed on prisoners on parole; second sentences imposed are served *first;* the time and manner of concurrency of service of original sentence is left to the Board of Parole.

The case at bar attempts to apply the converse of the above cited practice, causing second sentence to be subject to two constructions. We submit the same reasoning and announced rules of law here apply, that is, that the sentencing judge has invaded the exclusive jurisdiction of the board of parole, which is beyond his judicial power.

The court in discussing this phase of the law, in *Tippitt v. Squier,* supra, at page 213, has said, as follows:

> "If this sentence be subject to several constructions, that which makes it valid should be accepted. The phrase 'revocation of present suspended sentence and conditional release' refers to the discretionary right of the Board of Paroles to take such action under *18 U. S. C. A. Sec. 719.* The 'revocation' is a future board action. It does not refer to the Texas crime itself, for which the board may or may not revoke the good conduct deductions."

It is the contention of the petitioner that second sentence imposed on petitioner on May 25, 1942, excluding the last paragraph thereof, was complete and according to the established practice in situations as in the case at bar; that the last paragraph thereof was invalid and, at best only a gratuitous direction, not binding upon the parole board. It therefore follows that petitioner commenced to serve second sentence imposed on May 25, 1942, and that the Circuit Court of Appeals erred in not so holding.

It is, therefore, respectfully submitted that writ of certiorari should be granted.

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